REM Transportation Services, LLC, d/b/a Ambrose Auto & Autotrans Katayenko *and* Jorge Davila.
Case 01–CA–112724

November 19, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND SCHIFFER

On June 4, 2014, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions with supporting arguments and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and brief[2] and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order as modified and set forth in full below, and we shall substitute a new notice to conform to the Order as modified.[3]

ORDER

The National Labor Relations Board orders that the Respondent, REM Transportation Services, LLC, d/b/a Ambrose Auto & Autotrans Katayenko, Bedford, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, underpaying, or otherwise discriminating against employees for supporting International Brotherhood of Teamsters, Local 25, or any other labor organization, or for testifying at a Board hearing.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jorge Davila full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

(b) Make Jorge Davila whole for any loss of earnings and other benefits suffered as a result of discharging him and underpaying him for his seniority pay, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Jorge Davila for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to Jorge Davila's unlawful discharge, and within 3 days thereafter, notify him in

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[2] The General Counsel's brief includes a motion to strike documentary evidence that Respondent attached to its exceptions. The motion is granted. Documents that were not admitted into evidence are not part of the record in this matter. See *Electro-Tec, Inc.*, 310 NLRB 131, 131 fn. 1 (1993), enfd. mem. 993 F.2d 1547 (6th Cir. 1993); *Today's Man,* 263 NLRB 332, 333 (1982). Accordingly, Exhibit B to the Respondent's exceptions and any and all references to it are stricken.

The General Counsel did not except to the judge's refusal to admit certain evidence from a prior settled case concerning the Respondent and the Charging Party, which arguably bears on the Respondent's animus here. We need not pass on this issue, but we observe that, in general, "[e]vidence involved in a settled case may properly be considered as background evidence in determining the motive or object of a respondent in activities occurring either before or after the settlement." *St. Mary's Nursing Home*, 342 NLRB 979, 980 (2004), affd. sub nom. *NLRB v. St. Mary's Acquisition Co.*, 240 Fed. Appx. 8 (6th Cir. 2007), quoting *Black Entertainment Television*, 324 NLRB 1161, 1163 (1997).

We agree with the judge that the record supports a finding of unlawful motive. In particular, we note the Respondent's unsubstantiated prediction that unionization would "kill" the company, the presence of its principals at the 2012 unfair labor practice hearing at which Davila testified, the Respondent's disparate treatment of Davila, and the judge's discrediting of the Respondent's witnesses' stated reasons for their actions.

[3] We amend the judge's remedy to provide that backpay for the underpayment of Jorge Davila's seniority bonus shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), rather than *F. W. Woolworth Co.*, 90 NLRB 289 (1950). The *Ogle Protection* formula applies where, as here, the Board is remedying "a violation of the Act which does not involve cessation of employment status or interim earnings that would in the course of time reduce backpay." *Ogle Protection Service*, supra at 683; see also *Pepsi America, Inc.*, 339 NLRB 986, 986 fn. 2 (2003).

We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), *Don Chavas LLC, d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), and *J. Picini Flooring*, 356 NLRB No. 9 (2010), and to conform to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified and to the Board's standard remedial language, and in accordance with the Board's decision in *Durham School Services*, 360 NLRB No. 85 (2014).

writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored, in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Bedford, Massachusetts, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 2012.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 1 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 19, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, underpay, or otherwise discriminate against any of you for supporting Teamsters, Local 25, or any other labor organization, or for testifying at a Board hearing.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of Board's Order, offer Jorge Davila full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Jorge Davila whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL make Jorge Davila whole for any loss of earnings and other benefits suffered as a result of our underpayment of his seniority bonus, plus interest.

WE WILL compensate Jorge Davila for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Jorge Davila, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

REM TRANSPORTATION SERVICES

The Board's decision can be found at www.nlrb.gov/case/01-CA-112724 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

Laura Pawle, Esq., for the General Counsel.
Alexei Katayenko, Pro Se, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me in Boston, Massachusetts, on April 8, 2014. The complaint, which issued on January 31, 2014, and was based upon an unfair labor practice charge and a first and second amended charge that were filed on September 6, October 31, and December 19, 2013,[1] by Jorge Davila, an Individual, alleges that from about April 26 to about September 6, REM Transportation Services, LLC, d/b/a Ambrose Auto & Autotrans Katayenko (the Respondent), paid "seniority pay" to Davila that was lower than it paid to other employees with similar seniority, and on about September 6 it discharged him, all because of his union and protected concerted activities, and because he testified at a Board hearing in Case 01–CA–077143, in violation of Section 8(a)(3), (4), and (1) of the Act. The Respondent defends that his seniority pay was a lower amount because when the Respondent granted it to the employees it was based upon continuous service and as Davila had a break in his employment he was paid the lower amount. It further defends that Davila was discharged because of the large number of accidents that he was involved in.

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that International Brotherhood of Teamsters, Local 25, (the Union), has been a labor organization within the meaning of Section 2(5) of the Act.

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2013.

II. THE FACTS

A. Background

In late 2011, the Union attempted to organize the Respondent's employees and filed a petition with the Board in March 2012. Davila was one of the employees who assisted the Union in its unsuccessful organizational attempt and the Union withdrew the petition and filed unfair labor practice charges against the Respondent. The Region issued a complaint alleging the unlawful discharge of one employee and the reduction in hours for Davila. At a Board hearing conducted on December 13, 2012, Davila and a union representative testified about his union activities in the presence of the Respondent's owner, who was acting pro se for the Respondent. During a recess of the hearing, the parties settled the case with an informal settlement agreement.

B. Seniority Pay

On March 21, the Respondent established a seniority pay program for its employees effective in April. The memo to employees states, inter alia: ". . . we have added SENIORITY PAY to the Company payroll structure. What that means to you—employees with three years of continuous work will have an additional item—Seniority Pay—added to your paycheck starting April 2013. Three years of service—extra $20/week; five years of service—extra $35/week." Respondent prepared a list of its employees with their start day, and for Davila, it lists March 11, 2009, and $20 as his seniority pay. What caused this problem is that although Davila began working for the Respondent in 2007, he took a leave in February and March 2009, and when he left, he told Valery Parnas, Respondent's road manager, that he ". . . was going to be out for a while, for some time" and that Parnas told him to call when he returned. At Parnas' request, Davila signed a resignation notice dated February 6, 2009, and when he returned to work on about March 11, 2009, he signed a form stating that he was beginning a 60-day probationary period, as he had when he began working for the Respondent in 2007. The Respondent paid Davila $20 for seniority pay, as if he had begun work in 2009, rather than 2007. Counsel for the General Counsel alleges that since he was only away from employment for about a month in 2009, that should not have been considered a break in employment and that he had about 6 years seniority and should have received $35, rather than $20, seniority pay. It is alleged that this underpayment was due to his union activities and testimony at the Board hearing and therefore violative of Section 8(a)(3), (4), and (1) of the Act.

Counsel for the General Counsel introduced into evidence a seniority list prepared by the Respondent in response to a subpoena from the General Counsel. Among the employees, it lists Grisell Rosado as having a start day of March 26, 2009, and was listed for $20 seniority pay. However, Respondent's payroll records state that while she was hired in March 2009, she left Respondent's employ on March 4, 2011, although it doesn't state why she left, and returned to Respondent's employ on April 28, 2011, and she received a $20 seniority pay bonus. Eugeniy Karyakin, Respondent's general manager, testified: "It was my mistake."

C. Davila's Discharge

Davila was an active participant in the Union's attempt to organize the Respondent's employees in 2011 and 2012. He attended union meetings, signed an authorization card for the Union, distributed cards to other employees and returned the signed cards to the Union and spoke to most of the employees, by phone or by radio, about the benefits of the Union. The Union filed a petition with the Board on March 6, 2012, which it later withdrew. On March 16, 2012, the Respondent, by its President Alexei Katayenko wrote a letter to each of the employees stating, at the beginning: "Don't vote for the Union. Teamsters withdrew their petition to NLRB so now we can tell you the truth." At one point the letter states: "If union wins . . . drivers will see their pay go down, they will be paid $33–$44/day, depending on the route. Now you get $50–60. Don't vote for the Union." The letter also states:

> The truth is—if majority of employees elect union to represent them—it will hurt company a lot, cripple it and possibly just kill it in a short period of time. Union will sue us to our knees first, and we just lose most of our customers in that process. And who pays us salaries—union or customers? Don't vote for union.

On about March 22, 2012, the Respondent discharged employee Carlos Carrasquillo and on about April 10, 2012, the Respondent reduced Davila's hours of employment. The Region issued a complaint on August 31, 2012, alleging that Respondent violated Section 8(a)(3) and (1) of the Act by reducing Davila's hours and discharging Carrasquillo, as well as engaging in some 8(a)(1) activity, including the March 16, 2012 letter to employees. At the Board hearing conducted on December 13, 2012, on these allegations Katayenko represented the Respondent pro se and Parnas and Karyakin were also present throughout the hearing. Davila testified that the leading employees in the union campaign were "Carrasquillo and the rest of us" and that he spoke to a majority of the employees about the Union and asked between 15 and 25 employees if they wanted to sign authorization cards for the Union, and he was cross-examined briefly by Katayenko. Steven Sullivan, an organizer for the Union, testified that Carrasquillo "for sure contacted me numerous times" and Davila and others also assisted in attempting to organize the employees. He also testified that Davila gave him an envelope containing 20 signed authorization cards. Before the conclusion of the hearing, the parties agreed to an informal settlement agreement; Carrasquillo received backpay, but no reinstatement, Davila received $3000 backpay, and the Respondent posted a notice to this effect in January.

Davila had an accident on September 3 with the van that he was driving, which was a different van than he usually drove. On September 6, Karyakin gave him a letter of termination, which stated: "Please consider this letter as an employment termination notification, because of gross violation of Company policies—during period from April 2007 up to September 2013 you had 8 car accidents. (The last one you had on 9/3/2013.) Your employment with REM Services is terminated as of 9/6/2013."

The issue herein is whether Davila was discharged on September 6 because of his driving record, as alleged by the Respondent, or because of his union activity and testimony before the Board, as alleged by the General Counsel. In order to make this determination, it is necessary to examine his driving record, as well as the driving record of other employees. During the period of his employment with the Respondent, from 2007 to September 6, 2003, he had a number of "accidents" with his van. However, it should be noted that the word accident does not necessarily mean that there was any damage to either his van or the other vehicle, nor does it mean that any injuries resulted from the accident. Respondent defends that one reason for Davila's discharge was that its MART[2] contract required that he be discharged. The provision that Respondent relies upon states that drivers should not have: ". . . any record with multiple or repeated violations (other than parking). At a minimum, if any of the above violations are found within the previous 10 years, that driver or driver applicant should be prohibited from contact with HST consumers."

Prior to the last few days of his employment with the Respondent, Davila drove the same van, number 80. The drivers are permitted to take the vans home with them and return them to the facility weekly, for the mechanics to check over and maintain. When they are involved in an accident, they are required to call Parnas and complete an accident report form. Davila testified that to his knowledge the Respondent did not have any policy on the number of accidents that drivers were allowed before being terminated. If it was determined that the driver was at fault, he/she could be responsible for the cost of repairing the damage or the insurance deductible; Davila had to pay for the cost of an accident on one occasion.

March 28, 2008

While backing up in a parking lot Davila did not see a car behind him. He hit the car, "but it was not major. Just a small hit." There were no injuries. For damage, the report states: "A little dent." There were no passengers in the van at the time.

July 24, 2008

Davila was stopped on the ramp to an interstate highway, when another vehicle backed up from the breakdown zone and hit his vehicle. His vehicle damage was in excess of $1000. There were no passengers in the van at the time.

Davila testified that he did not receive any warning regarding his accident record in 2008.

September 28, 2009

While Davila's van was parked in front of his residence, it was hit by another car; the driver of that car left the scene of the accident, and Davila filed a police report about the incident. There was damage to the driver's side of the van. Davila had to pay the Respondent $200 for the cost of repairing the van.[3]

He received no warnings about his job performance in 2009.

August 5, 2010

While his van was stopped at a traffic light, a garbage truck

[2] The Respondent provides transportation for the elderly and disabled pursuant to contracts with MART, a regional transit authority.

[3] Additionally, during his employment with the Respondent, he has paid $60 for illegal parking, and $100 for passing a stop sign.

rear-ended his vehicle, damaging the rear bumper in an amount exceeding $1000. No passengers were in the van at the time.

December 30, 2011

While his van was stopped at red light, in the right lane, another vehicle "slammed" into the van. Apparently, there were no passengers in the van at the time and the accident report does not indicate the approximate amount of damage.

February 17, 2012

While he was backing up in a parking lot he hit another vehicle. The accident report states that there were no passengers in the van and that there was no damage to either vehicle.

After this accident, Karyakin told him that he should pay something for this accident, but he refused, and did not have to pay anything, and he testified that Karyakin never said that he would be terminated if he had another accident. Parnas did tell him, however, to be careful driving. Karyakin testified that after this accident he gave Davila a verbal warning that if he had another accident, he would be fired.

The accident that, allegedly, was the reason for Davila's termination occurred on September 3. Although his regular van was van 80, on September 3 he was told to cover a different route with van number 25, which he testified was "a bit old," and had problems with the brakes. Unlike his regular van, with van number 25 you had to press very hard on the brakes for the van to stop. He was driving behind another car that stopped abruptly, and he could not stop quickly enough, and hit the car in the rear. There was a "slight" amount of damage to the van, which had no passengers, and the individual in the other vehicle may have been injured. After the accident, he called Parnas to report the accident, and Parnas told him to come to the office when he returned. After returning to the office, he told the mechanic that the brakes were bad on the van and the mechanic worked on the van "for a while." He continued driving van 25 until September 6, when he was called to the office and Karyakin gave him the letter stating that he was terminated. Katayenko testified that when Davila came to the Respondent's garage on September 3 complaining that the brakes on van 25 were bad, he had his two mechanics check the brakes, and both said that the brakes were in normal condition, but the mechanics did not testify.

Counsel for the General Counsel introduced into evidence a number of exhibits intended to establish disparate treatment of Davila, due to his union activities and testimony at the 2012 Board hearing. Driver Michael Karapetyan was discharged on July 23, 2010, for "having numerous traffic accidents." Although it is difficult to decipher from the accident reports, Karapetyan had an accident on May 10, 2010, when he "touched" another car while changing lanes, on May 28, 2010, where he rear ended a car in front of him, and another accident on July 20, 2010, where, it appears that he was struck by another car while changing lanes.

Edward Arroyo was discharged on March 11 for failing to pay parking tickets, using the company vehicle for personal use, and damaging the Respondent's vehicle, through his fault. He had accidents on July 24 and November 10, 2010, January 24 and May 19, 2012.

Amelia Martinez was discharged on May 16 for five accidents and one "incident," where she stepped on the brake abruptly and the client was affected by the sudden stop. The first accident report lists an accident on November 6, 2011. Martinez' notes states that as she was making a left turn from the left lane, a car in the right lane also attempted to make a left turn and hit her van. The next accident was January 5, 2012, where she backed into a fence after she dropped off a client. On March 14, 2012, she was rear-ended while stopped at a traffic light, and on September 17, 2012, she rear-ended another vehicle while attempting to avoid another vehicle that was backing up. On April 2, 2013, her van was hit by another vehicle that was attempting to turn. Her last day of employment with the Respondent was May 16. Respondent's records state:

> On 5/16 she had an incident in the van—client fall [sic] and Mart removed Amelia Martinez till we get drug and alcohol test. We received drug test on 6/27/13. We tried to contact Amelia Martinez over the phone—no answer. After this on 7/23 we decided to terminate her—accidents plus incident.

Joseph Aime was terminated on September 11. He had an accident on February 5 and, although it is difficult to decipher his description of the accident, it appears to state that another vehicle hit his van. There was another accident on September 11 that involved a guard rail and Karyakin testified that the van was totaled.

Adaime Cristobal[4] had an accident on February 1, 2011; while backing out of a driveway, she hit a parked car and broke a light and damaged the bumper of the vehicle. On August 15, 2011, while she was attempting to turn left, another car drove past her and she hit the right-hand passenger side door of that car. On February 6, 2012, as she was waiting to turn, a car went through a stop sign and hit her van, damaging the rear bumper. On July 9, 2012, while she was backing out of a parking space, her neighbor bent over to pick up something in the street and Cristobal did not see her and hit her in the shoulder, and she fell to the ground and went to the hospital. On April 22, as she was backing out of a parking space, her van scratched the rear side fender of another car, causing some paint to come off, but no other visible damage.

Counsel for the General Counsel also introduced evidence of drivers who had accidents, but were not discharged. Manual Aybar had an accident on July 19, 2012, when another car drove through a stop sign and hit his van, and on March 3 while he was stopped at a light another car hit the passenger side of his van. In addition, on May 7, while his van was parked overnight near his residence, it was hit by another vehicle. Karyakin could not testify with certainty whether Aybar was still employed by the Respondent or, if he had been terminated, that it was due to accidents with the van. He did testify, however, that to his recollection the drivers discussed supra were the only ones who were terminated due to accidents, but regarding Aybar: "I don't remember about him."

[4] Respondent alleges that she was terminated after her last accident, although it did not produce the termination letter pursuant to the General Counsel's subpoena. On the list of employees eligible for seniority payments that Respondent prepared pursuant to the subpoena request of the General Counsel, Cristobal is included in the list.

Donald Brown's van was damaged on October 25, 2011, while it was parked; another vehicle came from the rear and hit the left rear bumper of the van. On March 28, while he was stopped at a stop sign, another car rear-ended his van while someone else was in his van, and on August 20, while he was parked at the curb, the car next to his hit his van while attempting to get out of a tight parking space. Brown is still employed by the Respondent.

Mario Martinez had an accident on June 16, 2011; while waiting at a traffic light, he moved his van slowly and "touched the car in front" of him. On March 4, 2012, the car behind him hit his van. On October 24, 2012, a car in front of him stopped abruptly, and he was unable to stop his van in time, and he hit the bumper of the car, and on March 8, while he was stopped at a light, another vehicle rear ended him.

Veronica Martinez's van was scratched by another car while it was parked on July 25, 2012. On about January 25, the car in front of her van unexpectedly stopped, and she was unable to stop before hitting the rear of that vehicle. On April 29, in a similar situation, she hit the rear bumper of the car in front of her. On August 20, the car in front of her stopped abruptly and, in order to avoid hitting that car, she turned into the right lane and hit another car. A few days later, she was involved in another accident, but the accident report does not state what occurred. Karyakin testified that he doesn't remember if Martinez was terminated after the August 20 accident.

Steven Ricker, who is still employed by the Respondent, had three accidents. The first occurred on August 24, 2011, where there was some damage to the left front side of the van; the accident report in evidence is incomplete. On February 13, 2012, he hit another car while making a turn, but there was no damage to his van, and on April 22 his van rear-ended another vehicle.

Yrbin Rodriguez had an accident on May 24 where he rear-ended a car that stopped "without any reason." His next accident occurred on July 22, 2011, when he was rear-ended while stopped at a red light, and on September 23, 2011, another vehicle hit his van while he was turning into a gas station. Karyakin testified that he is not sure if Rodriguez was fired, but believes that he recently resigned.

Reynaldo Rosario had an accident on October 31, 2012, when his foot slipped off the brake pedal while he was stopped at a traffic light and he stepped on the gas pedal by mistake, hitting the car in front of him. His next accident was on July 12 when he put the emergency brake on, thought that he put the van in park, and stepped out of the van, which moved slowly and hit the car in front of him. He then realized that the van was not in park. On July 15, the car in front of him braked sharply and he was unable to stop before rear-ending that car. As to whether Rosario is still employed by the Respondent, Karyakin testified: "I'd say no." When asked if he terminated him, he testified: "I don't remember that I terminated him."

III. ANALYSIS

The initial allegation is that the Respondent discriminated against Davila, in violation of Section 8(a)(3), (4), and (1) of the Act by paying him $20 a week seniority pay, rather than $35, which is given to employees with at least 5 years of service. Respondent defends that Davila left the Respondent's employ for about a month in February 2009, at which time he signed a resignation notice, and when he returned the following month, he signed a form stating that he was beginning a 60-day probationary period. As the announcement of the establishment of seniority pay provides for "continuous work," and as he "started" again in 2009, he had 4 years of continuous service, not 5, and was therefore only entitled to $20 seniority pay. Counsel for the General Counsel alleges that the only reason for giving him $20, rather than $35 weekly, was that he testified at the Board hearing and was active in the union campaign. In addition, Rosado was paid $20 weekly seniority pay because her two periods of employment were combined when she returned to Respondent's employ in April 2011, after being away for 7 weeks.

Under *Wright Line,* 251 NLRB 1083 (1980), the initial issue is whether counsel for the General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in Respondent's decision. If that has been established, the burden shifts to the Respondent to establish that it would have taken the same action even in the absence of the protected conduct. Counsel for the General Counsel has clearly established her initial burden. Katayenko's March 16, 2012 letter to the employees establishes union animus. In addition, Katayenko, Karyakin, and Parnas were all present at the Board hearing on December 13, 2012, when Davila and Sullivan testified to Davila's union activities in support of the Union's attempt to organize Respondent's employees. Further, disparate treatment was established with Rosado, who had a break in employment with the Respondent similar to Davila, yet received seniority pay which she was not entitled to as she did not have 3 years of continuous service. I find further that the Respondent has not satisfied its burden of establishing that Davila would have been paid $20 seniority pay even absent his protected conduct. Respondent's sole argument is that Davila did not have the required continuous service as he was away for 5 weeks in 2009, and signed a resignation letter on leaving, and a new probationary employee form when he returned. However, Rosado received the seniority pay under similar circumstances and I do not credit Karyakin's testimony that these payments to Rosado were a mistake. I find that too often his testimony was often "selective" in that it appeared that he remembered only what he wanted to remember. I therefore find that by paying Davila $20 a week seniority pay, rather than $35 a week, the Respondent violated Section 8(a)(3), (4), and (1) of the Act.

The remaining issue is whether Davila's discharge violates the Act. As stated above, Respondent was aware of his union activities as Katayenko, Karyakin, and Parnas were present when he testified at the Board hearing on December 13, 2012. In order to determine whether his discharge was pretextual and violated the Act, it is necessary to examine his driving record and compare it with the record of other employees who also had accidents, but were not discharged. This is not a perfect comparison for a number of reasons. For one thing, the accident reports are, at times, difficult to decipher and, the drivers often downplayed their responsibility for the accidents, so it is difficult to know what actually occurred. In addition,

Karyakin's testimony regarding whether certain employees were still employed was of little assistance.

Davila had two accidents in 2008, prior to his break in service in February and March 2009. In the March 2008 incident he was clearly at fault backing into another car, but causing little damage. He received no warnings for these accidents and was rehired in March 2009. In September 2009, his van was hit by another car while it was parked in front of his residence, in August 2010, his van was rear-ended by a garbage truck while he was stopped at a light, and in December 2011, his van was hit while he was stopped at a traffic light. Clearly, none of these three accidents could be attributable to his negligence, while the February 12, 2012 accident, where he hit another vehicle while backing up, was his fault. I credit Davila's testimony that after this accident, Parnas told him to be more careful, rather than crediting Karyakin's testimony that he warned him that if he had another accident, he would be discharged. His final accident occurred on September 3. Davila testified that it was caused by problems with the brakes on van 25 because he had to press very hard on the brakes for them to operate properly. Katayenko testified that his mechanics checked the brakes on van 25 and they said that they were in normal condition, but Respondent did not call the mechanics to testify. Although I would credit Davila's testimony over Katayenko, it is not necessary to do so. During the 6 years of his employment with the Respondent, Davila had two accidents that were clearly his fault, on March 28, 2008, and February 17, 2012, and both were minor accidents with no injuries and minor damage to the van. I can find no record of eight accidents, as stated in the September 6 termination letter. In addition, 19 months passed between the February 2012 accident and the September 3 accident, and only 9 months passed since Davila and Sullivan's testimony at the Board hearing describing his union activities. In addition, other employees such as Mario Martinez, Veronica Martinez, who had four accidents in 13 months, Steven Ricker, Yrbin Rodriguez, and Reynaldo Rosario had equally bad or worse accident records and, apparently, were not discharged. Further, Cristobal had five accidents in a little over 2 years, and Amelia Martinez was not discharged until after her fifth accident in 18 months. I therefore find that the discharge of Davila on September 6 for the September 3 accident was pretextual, and that he was fired in retaliation for his union activity and testimony at a Board hearing, in violation of Section 8(a)(3), (4), and (1) of the Act.

CONCLUSIONS OF LAW

1. REM Transportation Services, LLC has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. By paying Jorge Davila $20 weekly seniority pay, rather than $35 weekly, from April through September 2013, and by discharging him on September 6, 2013, the Respondent violated Section 8(a)(3), (4), and (1) of the Act.

THE REMEDY

The Respondent having discriminatorily underpaid Davila for his seniority pay from April to September 6 and discharging him on September 6, 2013, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010), enf. denied on other grounds sub.nom. *Jackson Hospital Corp. v. NLRB,* 647 F.3d 1137 (D.C. Cir. 2011). I shall also order the Respondent to file a special report with the Social Security Administration allocating Davila's backpay to the appropriate calendar quarters and to compensate him for any adverse income tax consequences of receiving his backpay in one lump sum.

Upon the foregoing findings of fact, conclusions of law, and on the entire record, I hereby issue the following recommended[5]

ORDER

The Respondent, REM Transportation Services, LLC, Bedford, Massachusetts its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against its employees because of their activities in support of International Brotherhood of Teamsters, Local 25, or any other labor organization, or because the employee, or employees, testified at a Board hearing.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Jorge Davila full and immediate reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and make him whole for any loss of earnings and other benefits that he suffered as a result of discharging him and underpaying him for his seniority pay, in the manner set forth in the remedy section of this Decision.

(b) File a special report with the Social Security Administration allocating Vega's backpay to the appropriate calendar quarters and compensate him for any adverse income tax consequences of receiving his backpay in one lump sum, as prescribed in *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Davila, and within 3 days thereafter notify him, in writing, that this has been done and that the discharge will not be used against him in any way.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Bedford, Massachusetts, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 2012.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 4, 2014

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Teamsters, Local 25, or any other union, or for testifying at a Board conducted hearing, and WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Jorge Davila immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, and our failure to pay him the proper amount of seniority pay, together with interest.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the discharge of Davila, and WE WILL, within 3 days thereafter, notify him that this has been done and that the discharge will not be used against him in any way.

REM TRANSPORTATION SERVICES, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-112724 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."